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No. 87-2027

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

STATE OF COLORADO ex rel. Colorado Attorney General Duane Woodard,
Petitioner,

v.

WESTERN PAVING CONSTRUCTION CO.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether proof of some affirmative act of concealment must be produced in order to toll the federal antitrust statute of limitations, 15 U.S.C. § 15b, under the equitable doctrine of fraudulent concealment.

RULE 28.1 STATEMENT

Respondent, Western Paving Construction Company ("Western Paving"), is an indirect wholly-owned subsidiary of Redland, PLC, a company based in Great Britain.

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The decision of the court of appeals sitting *en banc* (Pet. App. 1-2) is reported at 841 F.2d 1025. The vacated panel opinion of the court of appeals (Pet. App. 5-42) is reported at 833 F.2d 867. The opinion of the district court (Pet. App. 43-55) is reported at 630 F. Supp. 206.

JURISDICTION

The judgment of the court of appeals was entered on March 10, 1988 (Pet. App. 1-2). The petition for a writ of certiorari was filed on June 8, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 4B of the Clayton Antitrust Act, 15 U.S.C. § 15b, as amended (1982), provides:

> Any action to enforce any cause of action under sections 15, 15a, or 15c of this title shall be forever barred unless commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this Act shall be revived by this Act.

STATEMENT OF THE CASE

1. Petitioner, the State of Colorado, filed a complaint against respondent, Western Paving, on July 19, 1984, alleging that respondent had participated in a conspiracy to rig bids on a 1971 Colorado highway construction project, in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1 (1982) (Pet App. 5-6).[1] Petitioner did not, however, allege that any act of conspiracy occurred within the four-year limitations period established by Section 4B of the Clayton Act, 15 U.S.C. § 15b (*id.* at 6). Rather, petitioner alleged that respondent had fraudulently concealed the alleged violations and had thereby tolled the statutory limitations period (*ibid.*). The parties then conducted nearly two years of extensive discovery with respect to these issues (*ibid.*).

As to petitioner's allegation that respondent had engaged in bid-rigging in connection with the 1971 Newcastle Easterly project, discovery revealed only that one

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[1] Petitioner originally alleged that respondent had been involved in a conspiracy relating to two highway projects let in 1971 and 1978. But petitioner failed to substantiate, and subsequently withdrew, its allegations relating to the 1978 project. After respondent moved for summary judgment, petitioner alleged that respondent engaged in bid-rigging in connection with two other projects let in 1973 and 1974. The district court found, however, that "[t]he only conspiracy for which the State has presented factual support against Western Paving is the 1971 Newcastle Easterly job" (Pet. App. 52 n.4).

of the alleged co-conspirators, Larry Corn, an employee of one of respondent's competitors, Corn Construction Company, claimed to have had a single two-minute telephone conversation in 1971 with an officer of respondent, Harold Stillman (Pet. App. 9-10).[2] Corn claimed that he spoke with Stillman to determine if respondent would "go along" with Corn's scheme to win the 1971 Newcastle project (*id.* at 10). Corn could not remember the details of the alleged conversation, and acknowledged that respondent had never received a complementary bid from Corn Construction and that Corn had had no subsequent contacts with respondent (*id.* at 8-10).

Regarding petitioner's allegation of fraudulent concealment by respondent, discovery revealed that respondent had submitted a bid on the 1971 project that had the appearance of regularity, that Stillman failed to disclose the alleged bid-rigging telephone call to anyone before he died in June 1971, and that, during a 1982 interview with the Colorado Department of Highways, which occurred nearly seven years after the statute of limitations had already run on the 1971 project, one of respondent's officials denied any wrongdoing on respondent's part (Pet. App. 49-51). In addition, discovery revealed that Corn, but not respondent, had submitted a noncollusion affidavit on the Newcastle project, placed telephone calls to competitors from a motel where he was staying in Denver, and discarded a list of names of competitors allegedly involved in the conspiracy (Pet. App. 49-51).

2. At the close of discovery, respondent filed motions to dismiss and for summary judgment (Pet. App. 6). Petitioner, in turn, filed its own motion for partial summary judgment on the fraudulent concealment issue

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[2] Corn admitted that he had participated in at least 13 bid-rigging schemes and that he had settled the actions against him and his employer by paying damages and agreeing to cooperate with petitioner in the investigation and prosecution of other alleged bid-riggers (Pet. App. 10).

(*ibid.*). The district court (Arraj, J.) then granted respondent's motion for summary judgment (Pet. App. 43-56).

The district court began by noting that "[t]he courts have applied the equitable tolling doctrine differently, depending upon the circumstances and underlying facts of each case" (Pet. App. 46). "To invoke the equitable tolling doctrine in the antitrust context," the court found, courts have required "a plaintiff [to] plead and prove three elements: (1) affirmative acts of concealment by the defendant; (2) successful concealment from the plaintiff; *and* (3) plaintiff's due diligence until discovery of the facts" (*id.* at 46-47) (emphasis in original; citations omitted). By contrast, the court noted, "[f]raud cases are treated differently because the original fraud is itself an act of concealment and is considered to be inherently more difficult for a plaintiff to discover" (*id.* at 47).

The court then rejected petitioner's argument that proof of affirmative acts of concealment by respondent was not necessary in order to toll the antitrust statute of limitations (Pet. App. 48-49). The court noted that "[t]he cases cited by plaintiff in support of this argument involve underlying actions for fraud," and it found that "these cases are inapposite to the instant antitrust action" (*id.* at 48). The court added that petitioner "relies on a misconstrued reading of *King & King Enterprises v. Champlin Petroleum Co.*," 657 F.2d 1147 (10th Cir. 1981), *cert. denied*, 454 U.S. 1164 (1982), pointing out that "[t]he Court's decision to toll the statute was specifically based on a finding that 'the defendant actively sought to conceal its price fixing activities,'" and that the Tenth Circuit's holding in *King & King Enterprises* was that fraudulent concealment can be established in an antitrust case only by "proof of affirmative acts of concealment" (Pet. App. 48-49 & n.3, citing 657 F.2d at 1156, 1154-55).

The court next found that petitioner had not adduced sufficient facts relating to affirmative acts of concealment (Pet. App. 49-52). It concluded that petitioner "has failed to establish that [Corn's submission of a noncollusion affidavit] should be imputed to Western Paving," and that, in any event, "the submission of an allegedly false noncollusion affidavit is, at most, a failure to disclose or [a] denial of wrongdoing," neither of which amounts to "an affirmative act of concealment" (*id.* at 50). The court reached a similar conclusion with respect to both respondent's express denial of wrongdoing and Stillman's failure to disclose his alleged conversations with Corn prior to his death (*id.* at 50-51). Finally, the court held that neither the submission of a regular-appearing, complementary bid by respondent nor Corn's discarding of a list of competitors and telephone numbers were affrmative acts of fraudulent concealment (*id.* at 51). Noting that the facts forming the basis for petitioner's claim occurred more than 13 years prior to the filing of the complaint, the court concluded that "[t]his is a classic case in which the statute of limitations should be given effect" (*id.* at 52).

3. On appeal, a panel of the Tenth Circuit reversed and remanded (Pet. App. 5-42). The panel agreed with the district court that petitioner had failed to establish any affirmative acts of fraudulent concealment sufficient to toll the statute of limitations (*id.* at 26-28). It then held that proof of affirmative acts of concealment is not necessary where a conspiracy is "self-concealing" and rejected what it deemed to be the district court's contrary holding on this point (*id.* at 28-31). But the panel also held that, in order to alleviate the problems created by stale evidence, clear and convincing proof of the self-concealing conspiracy is necessary if the limitations period is to be tolled (*id.* at 32-38). The panel remanded for a trial on the basis of this evidentiary standard (*ibid.*).

4. In response to cross-motions for rehearing *en banc*, the Tenth Circuit ordered additional briefing and oral argument by the parties (Pet. App. 2-4). The full court then vacated the panel decision and affirmed the district court's decision by an equally divided court (*id.* at 2).

ARGUMENT

The decision below is correct. It does not conflict with any decision of this Court or any other court of appeals. Accordingly, review by this Court is not warranted.[3]

1. This Court has long held that the plaintiff who invokes the doctrine of fraudulent concealment will be "held to stringent rules of pleading and evidence, 'and especially must there be distinct averments as to the time when the fraud, mistake, concealment, or misrepresentation was discovered, and what the discovery is, so that the court may clearly see whether, by ordinary diligence, the discovery might not have been before made.'" *Wood v. Carpenter*, 101 U.S. 135, 139-140 (1879) (citation omitted). Under this view, where the plaintiff's substantive claim includes purposeful deception as one of its essential legal elements (*e.g.*, fraud), the Court has held that the concealment element is sufficiently pleaded and that only due diligence must additionally be proved in order to toll the statute of limitations. *Accord, Bailey v. Glover*, 88 U.S. (21 Wall.) 342, 349 (1874); *Exploration Co. v. United States*, 247 U.S. 435, 445 (1918); *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946). But where the plaintiff's substantive claim does not include purpose-

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[3] Just before filing this brief, respondent, on July 21, 1988, received the amici curiae brief filed on behalf of various state attorneys general. Since that brief does not contain any new arguments or authorities, but simply repeats the arguments made by petitioner, a separate response is not warranted. Accordingly, respondent's argument section of this brief answers both the petition and the amici curiae brief. It should be noted that these same arguments of the amici were also made before the *en banc* Tenth Circuit in an amicus curiae brief filed by the Attorney General of Florida.

ful deception as one of its essential legal elements, the Court has held that affirmative acts of concealment must be pleaded and proved in order to invoke the fraudulent concealment doctrine. *See Wood v. Carpenter*, 101 U.S. at 143. *Accord, Hennegan v. Pacifico Creative Services, Inc.*, 787 F.2d 1299 (9th Cir. 1986); *Berkson v. Del Monte Corp.*, 743 F.2d 53 (1st Cir. 1984) *cert. denied*, 470 U.S. 1056 (1985); *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974); *Laundry Equipment Sales Corp. v. Borg-Warner Corp.*, 334 F.2d 788 (7th Cir. 1964).

The decision below follows straightforwardly from these long-accepted principles. An equally divided court of appeals affirmed the judgment of the district court, which recognized that "[t]he courts have applied the equitable tolling doctrine differently, depending upon the circumstances and underlying facts of each case" (Pet. App. 46). The district court noted that, in fraud cases, the courts have only required proof of plaintiff's diligence because "the original fraud is itself an act of concealment and is . . . inherently more difficult for a plaintiff to discover" (*id.* at 47). By contrast, it found that, because concealment is not an essential legal element of an antitrust conspiracy claim, before the statute may be tolled in an antitrust conspiracy case, "[t]he concealment element requires proof that the defendant engaged in *affirmative* conduct designed to lead a reasonable person to believe that he did not have a claim for relief" (*ibid.*) (citations omitted; emphasis in original). These principles are, of course, the same principles that this Court has applied with respect to the equitable tolling doctrine generally.

Petitioner errs in suggesting (Pet. 11-18) that, by applying these established principles, the decision below relegates the antitrust laws to a position inferior to that of the laws pertaining to fraud. On the contrary, the decision below simply recognizes that, in contrast to a

fraud claim, an antitrust claim—in particular, a bid-rigging conspiracy claim—does not require proof of concealment. An antitrust claim requires proof of an agreement unreasonably to restrain trade; and the agreement need not be kept secret in order to be a violation of the law. *See, e.g., NCAA v. Board of Regents of Univ. of Okla.*, 468 U.S. 85, 98-113 (1984); *National Soc. of Professional Engineers v. United States*, 435 U.S. 679, 686-696 (1978). Thus, the decision below does not relegate the antitrust laws to an inferior position; it simply recognizes the different elements involved in antitrust and fraud claims.

2. Petitioner and amici further err in suggesting (Pet. 18-26; Amici Br. 7-10) that the federal courts are divided on the issue of fraudulent concealment in antitrust cases. Contrary to their contention and consistent with the conclusions of the district court below, every court of appeals that has addressed the issue of fraudulent concealment in an antitrust conspiracy case, where concealment is not one of the elements of the cause of action, has relied on proof of affirmative acts of concealment to toll the statute of limitations. *See, e.g., Pinney Dock and Transport Co. v. Penn Central Corp.*, 838 F.2d 1445, 1472 (6th Cir. 1988), *cert. pending on other grounds* No. 88-72 (filed June 11, 1988) (plaintiff "required to prove affirmative acts of concealment"); *Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp.*, 828 F.2d 211, 218-19 (4th Cir. 1987) (defendant's denials of conspiracy inadequate for tolling purposes; need affirmative conduct "directed at deflecting litigation"); *Hennegan v. Pacifico Creative Service, Inc.*, 787 F.2d 1229, 1302 (9th Cir.) *cert. denied*, 107 S.Ct. 279 (1986) (time-barred complaint dismissed for failure to allege "affirmative conduct that fraudulently concealed the existence of a cause of action"); *Berkson v. Del Monte Corp.* 743 F.2d 53, 56 (1st Cir. 1984), *cert. denied*, 470 U.S. 1056 (1985) (plaintiff's complaint dismissed

due to failure to allege "affirmative conduct" by defendant to conceal antitrust claim); *King & King Enterprises v. Champlin Petroleum Co.*, 657 F.2d 1147, 1154 (10th Cir. 1981), *cert. denied*, 454 U.S. 1164 (1982) (plaintiff's burden to show that "some affirmative act of fraudulent concealment frustrated discovery notwithstanding [due] diligence"); *In re Beef Industry Antitrust Litigation*, 600 F.2d 1148, 1169 (5th Cir. 1979), *cert. denied*, 449 U.S. 905 (1980) (fraudulent concealment doctrine requires showing that "defendants concealed the conduct complained of . . . ."); *Charlotte Telecasters, Inc. v. Jefferson-Pilot Corp.*, 546 F.2d 570, 574 (4th Cir. 1976) (time-barred complaint dismissed for failure to allege particular act of concealment); *Kansas City, Mo. v. Federal Pac. Elec. Co.*, 310 F.2d 271, 278 (8th Cir.), *cert. denied*, 371 U.S. 912 (1962) (fraudulent concealment doctrine applies to antitrust cases where defendants, "through affirmative action", fraudulently concealed conspiracy).

Contrary to the contention of petitioner and amici, the holding below is not in conflict with the Second Circuit's recent decision in *New York v. Hendrickson Bros., Inc.*, 840 F.2d 1065 (2d Cir. 1988), *cert. pending*, Nos. 88-21/43 (filed July 2 and 6, 1988).[4] Consistent with every other court of appeals that has addressed the issue, the Second Circuit in *Hendrickson* relied on a showing of affirmative acts of concealment to reach its conclusion that the statute of limitations had been equitably tolled. *New York v. Hendrickson Bros., Inc.*, 840 F.2d at 1085.[5]

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[4] The defendants in *Hendrickson* filed petitions for certiorari on an issue different than that presented by the petitioner herein, namely, whether the affirmative acts of concealment found in that case are attributable to co-conspirators for tolling purposes. *See* footnote 5, *infra*. The defendants in *Hendrickson* also contend that the self-concealing conspiracy theory is not an alternative basis for tolling the statute of limitations as to an alleged co-conspirator.

[5] The affirmative acts found sufficient to toll the statute of limitations in *Hendrickson* included the burning and shredding of "tell-

Moreover, in formulating its dictum regarding a self-concealing conspiracy, the court in *Hendrickson* relied exclusively on the subsequently-vacated panel opinion in this case even though substantial authority from the Second Circuit continues to support the affirmative acts requirement. *Cerbone v. Intern. Ladies' Garment Workers' Union*, 768 F.2d 45, 48 (2d Cir. 1985); *City of Detroit v. Grinnell Corp.*, 495 F.2d at 460. Accordingly, petitioner's reliance on the references in *Hendrickson* to a self-concealing conspiracy is misplaced and does not undermine the consistency with which courts of appeals have applied the fraudulent concealment doctrine in antitrust cases.

Petitioner and amici also err in referring to *King & King Enterprises v. Champlin Petroleum Co.*, 657 F.2d 1147, as a case which recognizes the self-concealing conspiracy standard and thereby conflicts with the decisions of other federal courts (Pet. 20; Amici Br. 9, n.9). On the contrary, as explained by the district court below, *King & King Enterprises* specifically confirms and applies the affirmative acts requirement (Pet. App. 49, n.3). In all events, the controlling precedent in the Tenth Circuit is not *King & King Enterprises* but the *en banc* affirmance of the district court's opinion in this case. Similarly misplaced are references by petitioner and amici to the district court opinions in *F. Buddie Contracting, Inc. v. Seawright*, 595 F. Supp. 422 (N.D. Ohio 1984), and *Bethlehem Steel Corp. v. Fishbach & Moore, Inc.*, 641 F. Supp. 271 (E.D. Pa. 1986). *F. Buddie* has been superceded by the Sixth Circuit decision in *Pinney Dock and Transport Co. v. Penn Central Corp.*, 838 F.2d 1445, specifically rejecting the self-concealing theory and requiring a showing of affirmative acts of concealment. And since the lower court opinion in *Fishbach* relied solely on the now-discredited opinion in *F. Buddie*, it too

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tale documents" and an agreement to give false testimony before a grand jury. *New York v. Hendrickson Bros., Inc.*, 840 F.2d at 1084.

has no precedent value. Accordingly, the cases relied on by petitioner and amici do not demonstrate any conflict in the lower federal courts on the issue of fraudulent concealment in antitrust cases.[6]

Of course, as a practical matter, persons conspiring to restrain trade generally attempt to conceal their agreements and activities in order to promote the success of their efforts. As a consequence, plaintiffs in antitrust conspiracy cases often, though not always, can produce proof of affirmative acts of concealment as well as the basic elements of their conspiracy claims. *See, e.g., New York v. Hendrickson Bros., Inc.*, 840 F.2d at 1084-1085; *Pinney Dock and Transport Co. v. Penn. Central Corp.*, 838 F.2d at 1472-1477; *Kansas City, Mo. v. Federal Pac. Elec. Co.*, 310 F.2d 271, 284. These decisions, as well as those relied on by petitioner and amici, are nonetheless consistent with the prevailing judicial view that proof of affirmative acts of concealment is necessary to toll the antitrust limitations period.

3. For much the same reasons, the claim of petitioner and amici (Pet. 26-29; Amici Br. 10-14) that the decision below is inconsistent with this Court's precedents is unfounded. As noted above, this Court has held that proof of plaintiff's diligence is all that is necessary to toll the limitations period in fraud cases where concealment is an element in the underlying cause of action; but in cases where the underlying cause of action does not require proof of concealment, proof of separate affirma-

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[6] Petitioner also cites two non-antitrust cases that merely state the rule that self-concealing conduct is sufficient to toll a statute of limitations in cases of fraud or in cases where concealment is a necessary element of the cause of action. *Ashland Oil Co. v. Union Oil Co.*, 567 F.2d 984, 988 (Temp. Emerg. Ct. App. 1977), *cert. denied*, 435 U.S. 994 (1978); *Baker v. F&F Investment*, 420 F.2d 1191, 1198-99 (7th Cir.), *cert. denied*, 400 U.S. 821 (1970). These cases do not conflict with the requirement that only proof of affirmative acts of concealment can toll the limitations period in antitrust cases.

tive acts of concealment is necessary for tolling purposes. Moreover, the Court has made it clear that proof of silence or passivity on the defendant's part is not sufficient; "[t]here must be some trick or contrivance intended to exclude suspicion and prevent inquiry." *Wood v. Carpenter*, 101 U.S. at 143. Finally, there is no basis for suggesting that requiring proof of affirmative acts of concealment in cases of alleged *per se* antitrust violations will read the fraudulent concealment exception out of the statute of limitations. As the cases cited above illustrate, in both *per se* and Rule of Reason cases, plaintiffs can often prove that affirmative acts of concealment were undertaken by defendants. Indeed, eliminating the requirement of proof of affirmative acts of concealment would read the limitations period out of the statute; a plaintiff would be entitled to have the statute of limitations tolled in every case where there is an alleged *per se* antitrust violation. *See Hall v. E.I. DuPont de Nemours & Co.*, 312 F.Supp. 358, 362 (E.D.N.Y. 1970). The fact that Congress did not provide for such a broad exception to the four-year limitations period set forth in Section 4B of the Clayton Act is persuasive evidence that it did not intend that there should be one.[7]

4. In the final analysis, petitioner and amici are masking their objections to the factual findings of the district court, affirmed by the court of appeals, with misleading arguments about the well-settled law of this Court and

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[7] In enacting Section 4B of the Clayton Act, Congress considered longer limitations periods but decided in favor of a "uniform statute of limitations applicable to *all* private treble damage actions—and Government damage actions as well—of 4 years." H.R. Rep. No. 422, 84th Cong., 1st Sess., 7 (1955) (emphasis added). It selected the shorter period as "fair and equitable", observing that "a lengthy statute of limitations may tend to prolong stale claims, unduly impair efficient business operations, and overburden the calendars of courts." *Id.* at 7-8. Significantly, the House Report specifically uses a conspiracy case to illustrate the need for a uniform four-year statute of limitations. *Id.* at 6.

the courts of appeal. Petitioner and amici object to the findings that none of the alleged acts—namely, the submission of a bid that had the appearance of regularity, Stillman's failure to disclose his alleged 1971 conversation with Corn, respondent's denials of wrongdoing, and the actions of Corn—constitutes an act of fraudulent concealment sufficient to toll the statute of limitations as to respondent (*see* Pet. 21-22, 27-29; Amici Br. 5-7, 13-14). Such factual findings, affirmed by the court of appeals below, are, of course, not worthy of review by this Court. *See Goodman v. Lukens Steel Co.*, —— U.S. ——, 107 S.Ct. 2617, 2623 (1987). In any event, these findings are correct and have produced a manifestly sensible result. As the district court in this case concluded:

> This is a classic case in which the statute of limitations should be given effect. The facts forming the basis for plaintiff's claim occurred over 13 years prior to the filing of the complaint. The State's case is based almost entirely on the testimony of one witness, Larry Corn. His testimony cannot be corroborated because the only Western Paving employee with whom he 'conspired,' Harold Stillman, is now deceased. Both parties admit that many, if not all, of the relevant documents, including the noncollusion affidavits, bid proposals and other documents relating to the bidding process, have been destroyed pursuant to normal record retention policies.

(Pet. App. 52, footnote omitted). The district court's practical and just resolution of this case was affirmed by the Tenth Circuit *en banc* and does not warrant review by this Court.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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